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Articles

A Life in the Balance: Is There a Right to Plead Guilty Even If It Is to Avoid the Death Penalty?

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I. Introduction

Is there a right to plead guilty? More specifically, once an accused is charged with a crime does that person have the right to plead guilty to the crime as charged at any time in the proceedings? To Kurt Michaels the answer to this seemingly straight forward, even simplistic question is a matter of life or death.[1]

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1. If the court had accepted Kurt Michaels guilty plea, the court would have been limited to sentencing Michaels to a prison term of twenty-five years to life. Because the court rejected the plea, Michaels stood trial and eventually was sentenced to death.

On the date set for his preliminary hearing on murder and burglary charges, Michaels was escorted into court where he was joined by his attorney. However, instead of submitting to a preliminary examination, Michaels offered a fully executed guilty plea to the murder charge pending against him.[2] Michaels's action caught the court by surprise. The prosecutor, who had been contemplating filing special circumstances and thus escalating the case against Michaels to death penalty status, was also taken aback.[3] The magistrate, at the urging of the prosecutor, took a strategic recess.[4] When court reconvened, the prosecutor tendered a hastily prepared, amended complaint charging special circumstances.[5] Michaels's attorney strenuously insisted that the magistrate must reject the amended complaint and instead accept Michaels's plea to the initial complaint.[6] The magistrate, after considerable indecision, rejected Michaels's plea and allowed the amended complaint to be filed.[7]

This remarkable turn of events was set in motion two months earlier when Michaels and another man entered a woman's apartment and murdered her.[8] Michaels was arrested two weeks

2. *See* Reporter's Transcript of Proceedings, Dec. 6 & 8, 1988, at 28, People v. Popik, Paulk, and Michaels, San Diego Municipal Court, CR N14859 [hereinafter "Transcript"].

3. *See id.* "I don't think this is a timely change of plea. It is a ruse on the court and the District Attorney and the community." *Id.*

4. *See id.* at 28-29. "You will have a few moments to see if you can discover some law to give me that says that it is not a matter of right for a defendant to change his plea and plead guilty to the face of the complaint as it is pled against him at any time during the proceedings. I believe they have that right. You will have to convince me that they do not. We will take a brief recess . . . ." *Id.*

5. *See id.* at 33. "We have an amended complaint prepared and presented to me. It alleges that the murder occurred while lying in wait, a violation of Penal Code Section 190.2(A)(15). That it was committed by the defendants who were engaged or were an accomplice to the commission of a first-degree burglary, in violation of Penal Code Section 190.2(A)(17)(VII). It also alleged it was carried out for financial gain, in violation of Penal Code Section 190.2(A)(1)." *Id.*

6. *See id.* at 35-36. "[B]efore the People tried to file their amended complaint, my client had already proffered his change of plea and asked to be allowed to plead guilty. I would urge the court to consider the fact that he is allowed to plead at any stage of the proceeding and he had attempted in good faith to plead prior to the filing of any amended complaint. I would urge, as a matter of right, he has the right to plead before such amended complaint."

7. *See* Transcript *supra* note 2, at 29-32.

8. *See* Respondent's Brief to the California Supreme Court, at 3, 6-14, People v. Michaels, S016924 (describing how Kurt Michaels and his accomplices entered the home of JoAnn Clemons, the mother of Kurt's girlfriend, Christina, and killed her in retribution for the years of abuse the deceased had inflicted on Christina) [hereinafter "Respondent's Brief"].

later and subsequently confessed to the killing.[9] On October 4, 1988, the office of the San Diego District Attorney filed a complaint charging Michaels with murder and burglary.[10] The complaint did not specify whether the murder charge was in the first or second degree, nor did it allege any special circumstances that would make Michaels eligible for the death penalty.[11] At his October 19, 1988, arraignment, Michaels pled "not guilty" to both charges.[12] At a bail review hearing on October 31, the prosecutor sought and received a "no-bail" status based on his representation that special circumstances allegations might be later added to the complaint.[13] And again on November 18, at a readiness hearing, the prosecution reiterated the possibility of amending the complaint to include special circumstances allegations.[14] However, no amendment was offered.[15]

On December 6, 1988, the date set for the preliminary hearing, counsel for Michaels offered a fully executed change of plea to guilty as to the murder count.[16] The prosecutor urged the magistrate to refuse the plea and allow him to amend the complaint to add special circumstances allegations.[17] Over adamant objections from Michaels's counsel,[18] the magistrate rejected the plea and allowed the prosecutor to amend the complaint to charge murder in the first degree with special circumstances allegations.[19] A plea to

9. *See id.* at 14 (describing the incidents surrounding the October 17, 1988, arrest of Kurt Michaels at a carnival grounds in El Cajon, California).

10. *See id.* at 1 (detailing the counts).

11. *See id.*; *see also* CAL. PENAL CODE § 190.2.

12. *See* Transcript *supra* note 2, at 3-4.

13. *See id.* at 4.

14. *See id.*

15. *See id.*

16. *See id.* at 28.

17. *See* Transcript *supra* note 2, at 28.

18. *See supra* note 6.

19. *See* Transcript *supra* note 2, at 32.

> I have decided that I would permit the People to prepare an amended complaint and present it to the court for filing and make a motion to file the amended complaint, which would charge special circumstances. I would ask for an offer of proof, a factual basis for the special circumstances, and if I felt it sufficient, I would grant the request and permit the filing of the amended complaint. If I did not find the factual basis for the allegations for special circumstances to be adequate, then I would not permit the filing of the amended complaint. Then, if I did not permit the filing of the amended complaint, the question becomes do I accept the change of plea from [Michaels]. And in my mind and to my knowledge, the defendant has the right to plead guilty to the face of the complaint at any time in the proceedings. However, he does not have the right as a matter of law to plead to a lesser-included offense. By the

murder, even if found to be murder in the first degree, carried a sentence of twenty-five years to life;[20] whereas if the jury convicted Michaels of the first degree murder and found even one of the special circumstances allegations true, Michaels would be sentenced to death or life in prison without the possibility of parole.[21] Michaels refused to enter a plea to the amended complaint.[22] Consequently, the magistrate entered a plea of "not guilty" and a denial of the special circumstances allegations on Michaels's behalf.[23] Michaels stood trial on the amended charges and allegations and was subsequently sentenced to death.[24]

This scenario draws into contrast the competing goals of a defendant's right to plead guilty to the crime for which that person is charged and a prosecutor's discretion to charge the defendant with the crime most accurately reflecting his or her conduct.[25] Does it defy statutory and judicial authority as well as common sense to maintain that one charged with a crime does not have the right to plead to the crime as charged? After all, it is the prosecutor who reviews the case and makes an informed filing decision. Once so initiated doesn't it follow that the accused can own up to the accusations and plead guilty? On the other hand, isn't it in society's best interest to allow prosecutors broad discretion in their filing decisions and in the subsequent amendment of those filing decisions? Surely, a system that would require prosecutors to file the most serious charge simply to protect against an early plea to a lesser charge is flawed. Tempered filing decisions are critical.

> nature of the laws of the pleading, Count One alleges a violation of Penal Code Section 187 and does not state whether it is first or second-degree murder. By law, if I permit a plea to the count as it is stated, it is second degree, because when you don't know whether it is first or second—for instance, in murder or burglary, if you don't know when you take the plea, by law it becomes the lesser offense. I do not have to accept the plea to a lesser offense of second-degree burglary, unless the People agree to that plea.

Id. at 32-33.

20. *See* CAL. PENAL CODE § 190 (West 1999). If Michaels was found guilty of second-degree murder, he faced a sentence of fifteen years to life. *See id.*

21. *See id.* § 190.2.

22. *See* Transcript *supra* note 2, at 40-41.

23. *See id.* at 41.

24. *See* Respondent's Brief *supra* note 8, at 2 (setting forth the dates and details of the 1990 trial at which Kurt Michaels was found guilty of murder and the special circumstances allegations were found true). Michaels's automatic appeal of all convictions and the judgment of death is currently pending before the California Supreme Court. The Court is expected to rule on the appeal in 2000.

25. For a general discussion of prosecutorial discretion, *see infra*, notes 174 to 209 and accompanying text.

What of changed circumstances?[26] What of newly developed facts?[27] What of dubious defense tactics?[28] How are they to be factored in? Must the prosecutor hasten on learning new facts to amend the charges and thereby prevent the accused from pleading to the original charge?

As the stakes escalate to those cases with death penalty implications, it may well be that the decision to file special circumstances allegations should not be made at the earlier phases of a case. In potential death penalty cases, perhaps the decision to file capital charges should not be made until after a preliminary hearing or a grand jury review.[29] The preliminary hearing and grand jury process allow the prosecutor a "dry run" of the case to assess critical witnesses and evidence and to gather a sense of how the witnesses and evidence may play out during the trial.[30] Moreover, delaying the ultimate filing decision in potential death penalty cases allows for ongoing investigation that may develop facts and circumstances that could significantly impact the filing decision.[31] In such instances a measured "wait and see what

26. It is possible to conceive of a variety of scenarios that may cause the prosecution to reevaluate its initial filing decision. For example, what of the situation where the defendant kills one victim and causes great bodily injury to a second. In these situations, it could certainly be argued that, while it was inappropriate for the prosecution to file death penalty charges at the outset of the case, the filing of such charges would certainly be warranted if and when the second victim dies.

27. Again, one can conceive of numerous scenarios where newly developed facts might warrant the amendment of the charging document to include special circumstances allegations. For example, one such situation might arise where, late in the investigation, facts come to light to show that the crime was committed for hire, or in the commission of a robbery, or that the victim was repeatedly raped either before or after the murder. In these circumstances, surely the prosecutor would be justified in seeking the death penalty.

28. *See infra* notes 68 to 86 and accompanying text.

29. This course of action intuitively would allow the prosecutor to assess more fully the case's weaknesses and strengths and the equities involved before taking the drastic step of filing special circumstances allegations. From a policy standpoint, this course of action surely must be preferred over having prosecutors overcharging the death penalty at the initial stages of homicide cases in order to circumvent "best-interest" pleas by defendants seeking to avoid the death penalty.

30. In cases where the prosecution is contemplating the filing of death penalty charges, the preliminary hearing provides a forum whereby the prosecution can find out if its case has any fatal weaknesses. In such a case, the prosecution can elect not to seek the death penalty and thereby save a lot of money that would otherwise have to be spent and also alleviate some of the pressures on counsel, the courts, and the defendant that are necessarily attendant to death penalty cases.

31. Indeed, many of the facts that give rise to special circumstances allegations may not be discovered until the later stages of the criminal investigation. As such, the prosecution should not be barred from adding these allegations at a later stage in the process. Furthermore, as sound policy, the prosecution also should not be

develops" approach may be the prudent course of action. Indeed, if there is any type of case that compels the most careful of deliberations, it is one with death penalty implications.

These competing dynamics are escalated in situations such as that which occurred with Kurt Michaels. The prosecutor's initial decision was not to file death qualifying charges. Rather, the prosecutor opted to continue assessing the case up to and including the preliminary hearing before making such a critical decision.[32] Only at the time of the abortive plea did the prosecutor allege special circumstances. Generally, amending the charges presents no problems because the prosecutor has virtually an unlimited right to amend the charging document up to and including the time of trial.[33] However, the *Michaels* scenario pinpoints the issue of whether the prosecutor's seemingly unlimited right to charge and to amend charging documents is cut off by a defendant's guilty plea. Or conversely, does the accused have a right to plead guilty to the pending charges?

It is the goal of this article to raise and examine two questions. First, is there a right to plead guilty? Second, assuming such a right exists, does it apply in cases where the prosecution attempts to amend the charge to seek the death penalty? We will examine the limited statutory and case authority as they relate to an accused's right to plead guilty, focusing particularly on California law but with a comparative review from other jurisdictions as well.[34] Implicit in this analysis is an examination of the competing policy goals of the prosecution's discretion in charging and the accused's right to plead. Specifically, as they are related to potential capital cases, should death-qualifying charges be filed initially or should the decision whether to seek the death penalty be delayed to maximize the time for the investigation? In the *Michaels* case, the San Diego District Attorney opted for the latter and delayed the decision, wanting to assess the strength of the case against Michaels at the preliminary hearing prior to making the final filing decision.[35]

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required to file prematurely special circumstances allegations at a time when the known facts may not so warrant.

32. *See supra* notes 10 to 19 and accompanying text.

33. *See* CAL. PENAL CODE § 1009 (West Supp. 2000). A postponement must be granted if the amendment prejudices substantial rights of the defendant. *See id.* Furthermore, the indictment or accusation cannot be amended to change the offense charged or to charge an offense not shown by evidence taken at the preliminary hearing. *See id.*

34. *See infra* notes 102 to 159 and accompanying text.

35. *See supra* notes 10 to 19 and accompanying text.

It is undisputed that prosecutorial discretion is essential within the American criminal justice system.[36] But, it is also undisputed that the discretion has limits. As set forth above,[37] those limits can from time to time be exceeded. Kurt Michaels's plea on December 6, 1988 before Judge Burley brought into sharp focus the limits of that discretion. The *Michaels* scenario may well represent an attempt by a prosecutor to reach beyond the permissible limits.

So the question then remains: when is the right to plead guilty abrogated? The answer to this seemingly fundamental question varies from jurisdiction to jurisdiction.[38] Some jurisdictions do not seem to address the question at all. Among those that explicitly deal with this important issue, the answer is not always clear.

II. Is There a Right to Plead Guilty?

Section 859a(a) of the California Penal Code provides in pertinent part:

> *If the public offense charged is a felony not punishable with death,*[39] the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him or her whether he or she pleads guilty or not guilty to the offense charged therein and to a previous conviction or convictions of crime if charged. While the charge remains pending before the magistrate and *when the defendant's counsel is present, the defendant may plead guilty to the offense charged*, or, with the consent of the magistrate and the district attorney or other counsel for the people, plead nolo contendere to the offense charged or plead guilty or nolo contendere to any other offense the commission of which is necessarily included in that with which he or she is charged and to the previous conviction

36. *See infra* notes 178 to 216 and accompanying text.

37. *See supra* notes 1 to 33 and accompanying text.

38. *See infra* notes 102 to 159 and accompanying text.

39. It could be argued that any murder charge is a felony punishable with death up until the point at which the prosecution is precluded from amending the charging document to include death-qualifying charges. However, California's statutory scheme limits the use of the term "punishable with death" to those situations where death-qualifying charges have been alleged. *See* CAL. PENAL CODE § 190(a) (West 1999) ("Every person guilty of murder in the first degree shall suffer death, confinement in the state prison for life without the possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.").

> or convictions of crime if charged upon a plea of guilty or nolo contendere. . . .[40]

Penal Code Section 859a(a) reads quite plainly and confirms the common sense notion that, except for capital cases,[41] the accused has the right to plead guilty to the crime as charged.[42] Therefore, under California's statutory scheme, a plea of guilty is the equivalent of a conviction of the crime.[43] All allegations of the offense are admitted by such a plea.[44] Likewise, the California appellate courts have read Penal Code Section 859a(a) to mean that a guilty plea is a conclusive admission of guilt and of every element constituting the offense charged; it is no less than a confession to every fact giving rise to the charge(s) contained in the pleading.[45] It then follows that a defendant may plead guilty to all charges [save capital charges] without prosecutorial consent and, when he does so, all that remains is the pronouncement of judgment and sentencing.[46] Capital charges are specifically exempted from Section 859a(a).[47] However, if no capital charges have been filed against the defendant, there is no requirement that the prosecutor consent to the guilty plea.[48] With a guilty plea, the accused has terminated the prosecutor's right to amend the charges.[49]

California Penal Code Section 859a(a) mandates that the accused has an absolute right to plead guilty to the crime as charged.[50] However, under the plain language of Penal Code Section 859a(a), a guilty plea to a lesser included offense, or even to a related but different offense, may be rejected either by the

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40. *Id.* § 859a(a) (emphasis added).

41. In California, the only felony punishable by death is murder where special circumstances allegations have been found true. *See id.* § 190.2.

42. *See id.*

43. *See* Arenstein v. California State Bd. of Pharmacy, 265 Cal. App. 2d 179 (Cal. Ct. App. 1968).

44. *See id.*

45. *See id.*

46. *See* CAL. PENAL CODE § 1016, subd. 1 (West Supp. 2000); People v. Superior Court (Smith), 82 Cal. App. 3d 909 (Cal. Ct. App. 1978).

47. *See* CAL. PENAL CODE § 859a(a). While capital charges are specifically exempt from the scheme set forth in section 859a(a), the statute does not address the situation where special circumstances allegations might later be added. *See id.*

48. *See id.* §§ 859a(a), 1009.

49. It should be noted, however, that a plea of nolo contendere does not affect the prosecutor's ability to amend the charges. Because § 859a(a) specifically requires prosecutorial consent for a nolo contendere plea, if the prosecutor wishes to amend the charging document prior to the entry of such a plea, all the prosecutor has to do in order to circumvent the defendant's pleading rights is withhold consent. *See id.* § 859a(a).

50. *See id.* § 859a(a).

magistrate or the prosecution.[51] The accused has no right to change or alter the charges against him. However, it seems equally fundamental that the accused can plead to the charges pending against him as they were brought by the prosecution. Given that the prosecution made the decision as to which charges to file against the defendant, it is axiomatic that the accused in pleading is simply reacting to the prosecution's lead.

Despite the seemingly clear mandate of Penal Code Section 859a(a), exceptions to the requirement that a magistrate must accept a validly proffered plea have been created or recognized by the California courts. It should be noted, however, that such exceptions have been applied in very limited circumstances. The seminal cases in California are *People v. Hall,*[52] *Cronk v. Municipal Court,*[53] and *People v. Reza.*[54]

In *People v. Hall,*[55] the defendant was charged with robbery,[56] with being an ex-felon in possession of a concealed firearm,[57] and with use of a firearm.[58] The defendant (Hall) "offered to stipulate that he was an ex-felon and that he would be guilty of violating Section 12021 if the jury found that he possessed a firearm during the commission of the robberies."[59] Hall then moved to exclude any mention of his prior convictions.[60] The prosecution refused to accept the stipulation and the trial court denied Hall's motion.[61] The trial court also denied Hall's motions to delete any reference to

51. *See id.*

52. 616 P.2d 826 (Cal. 1980), *overruled by* People v. Newman, 981 P.2d 98 (Cal. 1999).

53. 138 Cal. App. 3d 351 (Cal. Ct. App. 1982).

54. 152 Cal. App. 3d 647 (Cal. Ct. App. 1984).

55. 616 P.2d 826, *overruled by Newman*, 981 P.2d 98. Newman only overruled Hall to the extent that the latter required defendants be advised of their *Boykin-Tahl* rights before a stipulation as to the existence of prior felony convictions could properly be accepted by the court. This language, as found in footnote 9 of the *Hall* decision, was held by *Newman* to be dictum and at odds with the California Supreme Court's reasoning in *People v. Adams*, 862 P.2d 831, 836 (Cal. 1993). *See Newman*, 981 P.2d at 104 n.6 ("We expressly disavow the contrary dictum set forth in *Hall*, supra, [ ], footnote 9, and, to the extent they are inconsistent with the conclusion set forth in this opinion, the decisions of the Courts of Appeal in *Robertson* [ ] and *Turner* [ ] are disapproved.") (citations omitted).

56. *See* CAL. PENAL CODE § 211 (West 1999).

57. *See id.* § 12021.

58. *See id.* § 12022.5; People v. Hall, 616 P.2d at 826 (Cal. 1980).

59. *Hall,* 616 P.2d at 830.

60. *See id.*

61. *See id.*

the nature of his previous convictions and to sever the Section 12021 charge from the robberies.[62]

The California Supreme Court determined that it was error for the trial court to allow evidence on an issue to which the defendant was willing to stipulate unless that evidence retains some probative value.[63] Because Hall's prior convictions had no probative value other than to prove the Section 12021 violation, the trial court should have excluded any mention of the defendant's prior convictions.[64] The court held that if a defendant offers to admit the existence of an element of a charged offense, the prosecution and trial court must accept that offer.[65] However, the court determined that the error was not prejudicial and thus affirmed Hall's conviction.[66]

It should be noted, however, that two years after *Hall*, the voters of California passed Proposition 8.[67] One of the results of the passage of Proposition 8 was the enactment of the current Section 28 of Article 1 of the California Constitution. Subsection (f) of Section 28 reads:

> (f) Use of Prior Convictions. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.[68]

Thus, the California Constitution has abrogated *Hall*, but only to the extent that the ruling applies to the use of prior felony convictions.[69]

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62. *See id.*
63. *See id.* at 831.
64. *See Hall,* 616 P.2d at 831.
65. *See id.* at 836.
66. *See id.*
67. *See* Victims' Bill of Rights, Initiative Measure Proposition 8 (approved June 8, 1982) (codified at CAL. CONST. art. I, §§ 12, 28; CAL. PENAL CODE §§ 25, 667, 1191.1, 1192.7, 3043 (West 1999); CAL. WELF. & INST. CODE §§ 1732.5, 1767, 6331 (West Supp. 1998)).
68. CAL. CONST. art. 26, subs. f.
69. *See* People v. Reza, 152 Cal. App. 3d 647, 654 n.2 (Cal. Ct. App. 1984) (stating that "Proposition [8] only reaches that portion of the *Hall* line of authority relating to crimes which contain a prior conviction as an element. . . ."). Proposition 8 notwithstanding, *Hall* continues to stand for the proposition that once a defendant offers to stipulate to the existence of an element of a charged offense, the prosecution and court have no discretion and must accept that stipulation. *See Hall,* 28 Cal. 3d at 152.

The 1982 case of *Cronk v. Municipal Court* involved dubious defense tactics.[70] In *Cronk*, the State filed a felony complaint charging Cronk with murder.[71] The complaint did not specify the degree of murder.[72] When Cronk appeared before the magistrate on July 17, 1981, counsel was appointed and the magistrate set the arraignment for July 24.[73] On July 20, without notice to the district attorney, defendant's counsel filed an *ex parte* application requesting that the arraignment be advanced to July 21.[74]

The arraignment was advanced and, on July 21, Cronk appeared with counsel and attempted to plead guilty as charged to the complaint.[75] The prosecutor was taken by surprise and moved to dismiss.[76] The prosecutor represented that since the time that the complaint was initially filed, additional evidence had come to light which now warranted the filing of special circumstances allegations.[77] The prosecutor stated that he was not aware until earlier that very day that Cronk was in local custody and due to be arraigned.[78] At the insistence of the prosecutor and over the strenuous objection of Cronk, the magistrate continued the matter for one day to allow the filing of an amended complaint charging murder in the first degree with special circumstances allegations.[79]

Throughout the proceedings, Cronk and his counsel insisted that, pursuant to Penal Code Section 859a(a), the magistrate was mandated to accept Cronk's guilty plea.[80] The California Court of Appeal disagreed and held:

> Though Penal Code Section 859a, [subdivision] (a) appears with a reasonable construction to be mandatory, there are certain exceptions to this mandatory language.... If the defense, without notice to the other side, accelerated a hearing date so as to cut off a legitimate right to amend, [citation omitted], the magistrate has the inherent power to restore that right to the prosecution by refusing to accept the plea and granting a short continuance.

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70. 138 Cal. App. 3d 351 (Cal. Ct. App. 1982).
71. *See id.* at 352.
72. *See id.*
73. *See id.*
74. *See id.* at 352-53.
75. *See Cronk,* 138 Cal. App. 3d at 353.
76. *See id.*
77. *See id; see also* CAL. PENAL CODE § 190.2 (West 1999).
78. *See Cronk*, 138 Cal. App. 3d at 353 (the defendant was arrested in Idaho and extradited to California to stand trial for murder).
79. *See id.* at 353.
80. *See id.*

. . . .

> The purpose of Section 859a, [subdivision] (a) is to allow a speedy process for defendants and eliminate unnecessary procedural niceties to allow the efficient disposition of criminal matters. It was never designed to allow defendants to use surreptitious calendar changes to defeat the right of the People to amend to allege what may very well be just and proper charges of criminal activity.[81]

While probing the limits of Penal Code Section 859a(a), *Cronk* generally reinforced its mandatory nature.[82] It was the surprise induced by the dubious defense tactic in accelerating the arraignment date that warranted the amended filing.[83] To that extent, *Cronk* does carve a "dubious defense tactic" exception from Penal Code Section 859a(a). Perhaps as significant as what *Cronk* held was what it did not hold. Specifically, the development of additional evidence was not a factor in the court's decision.[84] Although the prosecutor specifically requested to amend the complaint to allege special circumstances due to new evidence that had come to light since the filing of the original complaint,[85] the court failed to address this issue in its opinion, instead relying solely on the fact that the defense had engaged in tactics that the Attorney General characterized as "Gamesmanship and all that Jazz."[86] This leaves open the issue of whether newly discovered evidence can serve as an exception to Section 859a(a)'s mandate.

Two years later in *People v. Reza*,[87] the California Court of Appeal had another opportunity to examine the defendant's right to plead guilty. Reza was charged with an October 1981 burglary and with a November 1982 attempted burglary.[88] On the trial date, Reza moved to change his plea to the attempted burglary charge from not guilty to guilty.[89] Because the evidence supporting the attempted burglary charge was very strong while the evidence for the burglary charge was relatively weak, Reza sought to stand trial for only the burglary charge by pleading guilty to the attempted

81. *See id.* at 354 (adopting in part the opinion of the trial judge denying the defendant's writ of habeas corpus from which the present appeal was taken).
82. *See id.*
83. *See Cronk*,138 Cal. App. 3d at 354.
84. *See id.* at 353 & n.1, 354.
85. *See id.* at 353 & n.1.
86. *See id.* at 354 & n.2.
87. 152 Cal. App. 3d 647 (Cal. Ct. App. 1984).
88. *See id.* at 650.
89. *See id.* at 650-51.

burglary.[90] The trial judge, at the urging of the prosecutor, refused the plea.[91] Reza appealed.[92]

The California appellate court held that the trial judge should have accepted the plea and concluded that "it is error to reject a competent defendant's offer of an unconditional plea of guilty in a non-capital case where there is a factual basis for the plea."[93] The court determined that "[t]he decision as to how to plead is personal to the defendant."[94] "But 'the legislature has the power to regulate, in the public interest, the manner in which that choice is exercised.' "[95]

The court then noted that, in non-capital cases, a guilty plea could be rejected " 'to protect defendants against the consequences of their own folly or neglect.' "[96] While acknowledging that limitation, the *Reza* court properly noted that " '[a] court does not have unlimited power to either refuse to accept, or to vacate, a guilty plea.' "[97] " 'Thus it is the legislative prerogative to specify which pleas the defendant may elect to enter, when he may do so, where and how he must plead, and what the effects are of making or not making certain pleas.' "[98]

Much like *Cronk*, Reza's attempt to plead guilty was an attempt to manipulate the system, yet the court still held that Reza's guilty plea was wrongly rejected.[99] The *Reza* court found that the California Supreme Court's decision in *People v. Hall*[100] "cut the underpinnings" of any discretion to reject a valid guilty plea.[101]

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90. *See id.* at 651.
91. *See id.*
92. *See Reza,* 152 Cal. App. 3d at 651.
93. *See id.* at 654 (the error did not require reversal as it was found harmless).
94. *Id.* at 651 (citing *In re* Williams, 1 Cal. 3d 168, 177 & n.8 (Cal. 1969)).
95. *Id.* at 651 (quoting People v. Chadd, 28 Cal. 3d 739, 747-48 (Cal. 1981)).
96. *See id.* at 652 (quoting *Chadd*, 28 Cal. 3d at 751 n.8) (discussing how a guilty plea that is knowingly and voluntarily entered can be properly rejected if the court finds that there is no proper factual basis for that plea).
97. *See Reza,* 152 Cal. App.3d at 652 (quoting People v. Thompson, 10 Cal. App. 3d. 129, 137 (Cal. Ct. App. 1970)).
98. *Id.* at 651 (quoting *Chadd*, 28 Cal. 3d at 747-48) (internal citations omitted).
99. *See id.* at 654. It should further be noted, however, that the dubious defense tactic in *Reza* was relatively minor when compared to the tactic used in *Cronk*.
100. 616 P.2d 826 (Cal. 1980).
101. *See Reza*, 152 Cal. App. 3d at 654.

III. Review of Other Jurisdictions

Given the paucity of judicial interpretation of California's Penal Code Section 859a(a), a review of the law of other jurisdictions may shed insight on the dilemma Michaels's plea created and may suggest some alternative approaches that would prevent such a scenario from occurring again.[102]

What then of other jurisdictions? Is the California approach typical or atypical? A comparative approach should lend breadth of perspective to this fairly narrow issue. To that end, we have selected several jurisdictions which have confronted problems similar to the *Michaels* scenario. Specifically, we looked to the laws of Massachusetts, Florida, and New York to see how the courts and legislatures of those states have dealt with this issue.

Massachusetts law reads similarly to California's. Massachusetts Rule 12 of Criminal Procedure reads:

> (a) Entry of Pleas.
>
> (1) Pleas Which May Be Entered and by Whom. *A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which he has been charged and over which the court has jurisdiction.* A plea of guilty or nolo contendere shall be received only from the defendant himself except pursuant to the provisions of Rule 18. Pleas shall be received in open court and the proceedings shall be recorded where facilities for recording are available. *If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.*[103]
>
> (2) *Acceptance of Plea of Guilty or Nolo Contendere.* A judge may refuse to accept a plea of guilty or nolo contendere. He shall not accept such a plea without first determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea.[104]

Subsection (2) appears to clarify the last sentence of subsection (1), in that subsection (2) explains the circumstances under which a judge must not accept a plea of guilty. Not surprisingly the judge must refuse the plea if it is not knowingly and voluntarily made.

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102. *See infra* notes 103 to 159 and accompanying text; *see also* Section VI of this article, *Proposed Modification to Existing California Law.*

103. Mass. R. Crim. P. 12(a)(1) (West 1995) (emphasis added).

104. Mass. R. Crim. P. 12(a)(2) (emphasis added).

Furthermore, Rule 12 (c)(5)(A) reads:

> (5) Hearing on Plea; Acceptance. The judge shall conduct a hearing to determine the voluntariness of the plea and the factual basis of the charge.
>
> (A) Factual Basis for Charge. A judge shall not accept a plea of guilty unless he is satisfied that there is a factual basis for the charge. The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea. Upon a showing of cause the tender of the guilty plea and the acknowledgment of the factual basis of the charge may be made on the record at the bench.[105]

Again, not surprisingly, the trial judge must reject a guilty plea if he is not satisfied as to the factual basis for the plea. From a plain reading of Rule 12, it requires judicial acceptance of a guilty plea if the plea is entered knowingly, voluntarily, and with a factual basis.

The few appellate cases that have arisen in Massachusetts under Rule 12 are consistent with this proposition. A Massachusetts appellate court in *Commonwealth v. Kelleher*[106] upheld the trial court's refusal to accept a guilty plea. In *Kelleher*, the defendant was indicted for various crimes including breaking and entering, possession of burglarious instruments, assault and battery with a dangerous weapon, and assault with intent to rape.[107] Kelleher had prior convictions for rape, armed robbery, and armed burglary.[108] In exchange for a lenient sentencing recommendation from the prosecutor, the defendant attempted to plead guilty to all four counts.[109] His guilty plea was rejected by the trial judge.[110] Kelleher went to trial and a jury convicted him on all of the charged counts.[111]

Kelleher involved a plea negotiation between Kelleher and the prosecution that was found unacceptable by the trial court.[112]

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105. Mass. R. Crim. P. 12(c)(5)(A).
106. 547 N.E.2d 56 (Mass. App. Ct. 1989).
107. *See id.* at 57.
108. *See id.*
109. *See id.*
110. *See id.* at 57 & n.2. While it is not clear from the record why the trial judge chose to reject Kelleher's plea, it appears that the judge, concerned with Kelleher's prior criminal record, determined that the terms of the best-interest plea did not provide for a severe enough sentence. Apparently, the judge wanted an upward departure from the plea agreement and felt constrained to reject the plea rather than accept it with the attached conditions.
111. *See Kelleher,* 547 N.E.2d at 57.
112. *See id.*

Kelleher had conditioned his guilty plea to a particular sentencing recommendation. The appeals court held:

> The defendant argues that the judge is bound to accept the recommendation to the same extent the prosecutor is bound to honor the promises he made during plea negotiations. The defendant's argument is off the mark. "[T]his is not a situation where the prosecutor reneged on his promises." [Citations omitted.] The judge made no promises to the defendant prior to the hearing and in the exercise of sound judicial discretion rejected the defendant's guilty plea. [113]

Kelleher, unlike *Michaels*, involved a plea negotiation. Kelleher's guilty plea was conditioned on the trial court's acceptance of the sentencing recommendation. Given such circumstances, of course "[t]he acceptance of a guilty plea is within the discretion of the trial judge."[114] To hold otherwise is to deny the judge his rightful role in the sentencing process.

Kelleher provides no additional insight to Rule 12. It would seem, however, from *Kelleher* and the statute that the previously described proposition could be expanded to the following: Rule 12 renders judicial acceptance of a plea mandatory if the plea is entered with a factual basis knowingly, voluntarily, and *unconditionally.*

Two further appellate cases arising in Massachusetts confirm the plain language and intent of Rule 12. In *Commonwealth v. Dilone*[115] and *Commonwealth v. Del Verde*[116] the court upheld the right of trial judges to refuse pleas as set forth in Rule 12.

In *Dilone*, the judge refused to accept the defendant's guilty plea to a second-degree murder charge because the judge determined that there was no factual basis for the plea.[117] At the time Dilone attempted to plead guilty, he testified under oath that he did not kill the victim, did not point the gun at the victim and did not know how the gun was discharged.[118] As such, the judge's refusal of the guilty plea in *Dilone* was mandated by the language of Rule 12(c)(5)(A). It did not involve a purely discretionary determination by the trial judge.

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113. *Id.* at 58 (citations omitted).
114. *Id.* at 57.
115. 431 N.E.2d 576 (Mass. 1982).
116. 496 N.E.2d 1357 (Mass. 1986).
117. *See Dilone*, 431 N.E.2d at 579-80 (citing Mass. R. Crim. P. 12(c)(5)(A)).
118. *See id.* at 579.

Similarly, in *Del Verde*, the trial court refused a guilty plea not as a matter of discretion but as a matter of law. Del Verde, a mentally retarded 18 year old, had spent most of his life either in mental institutions or in foster homes.[119] Following his arrest, he confessed to murder and rape. He was then ordered to be evaluated to determine whether he was competent to stand trial.[120] After several evaluations, Del Verde was ultimately determined to be incompetent to stand trial.[121] Through defense counsel and his guardian he was able to reach a plea bargain with the district attorney whereby he would plead guilty to the lesser offense of manslaughter.[122] The parties sought to enter the plea by use of the doctrine of substituted judgment.[123] The trial judge refused to accept Del Verde's guilty plea.[124]

On appeal, the Supreme Judicial Court of Massachusetts upheld the rejection of the plea.[125] That court determined that a guilty plea proffered by a mentally incompetent defendant would be invalid because it would not be knowingly and voluntarily entered.[126] Accordingly, the trial judge could not accept the plea in light of Rule 12(a)(2) and the United States Supreme Court's decision in *Boykin v. Alabama*.[127] Pursuant to Massachusetts Rule

119. *See Del Verde*, 469 N.E.2d at 1358.
120. *See id.* at 1359.
121. *See id.*
122. *See id.*
123. As the court in *Del Verde* stated:

> The doctrine of substituted judgment originated in England to authorize a gift from the estate of an incompetent person to an individual to whom the incompetent owed no duty of support. The doctrine first appeared in this Commonwealth in legislation empowering the probate court to authorize a conservator or guardian to formulate and administer an estate plan for an incompetent. The first common law application in Massachusetts of the substituted judgment doctrine was in *Superintendent of Belchertown State School v. Saikewicz*, in which we approved the withholding of life-prolonging medical treatment to an elderly mentally retarded person suffering from acute myeloblastic monocytic leukemia. To our knowledge . . . all subsequent cases in Massachusetts in which substituted judgment has been used have involved either the withholding or forced administration of medical treatment.

Id. at 1361 (citations omitted).
124. *See Del Verde*, 469 N.E.2d at 1359.
125. *See id.* at 1366.
126. *See id.* at 1360-61.
127. 395 U.S. 238 (1969). In *Boykin*, the United States Supreme Court held that when a trial court accepts a guilty plea, it should ensure that the record reflects that the defendant voluntarily and knowingly waived his constitutional rights to a jury trial, to confront and cross-examine witnesses, and those protecting against compulsory self-incrimination. *Id.* at 242-43.

12 the right to reject a guilty plea is limited to those instances specifically set forth in that Rule.

Much like Massachusetts, Florida procedure provides that a "defendant may plead not guilty, guilty, or, with consent of the court, nolo contendere."[128] Like the Massachusetts Rules of Criminal Procedure, Florida law further provides that a court shall reject a guilty plea if it is not knowingly and voluntarily proffered.[129] Also like Massachusetts, Florida law commands that the judge must find a factual basis for the plea.[130] Additionally, Florida's law dictates that "[w]hen an indictment or information charges an offense that is divided into degrees without specifying the degree, if the defendant pleads guilty, generally the court shall, before accepting the plea, examine witnesses to determine the degree of the offense of which the defendant is guilty."[131]

Florida's scheme appears to mirror the mandatory nature of California's law.[132] However, as with the California and Massachusetts statutes, it remains for Florida's appellate courts to more fully shape and hone the legislative effort. Unfortunately, the case law from Florida does not provide a clear answer as to whether a defendant has the absolute right to enter a plea of guilty when the plea is knowingly and voluntarily entered and there is a factual basis for the plea.[133]

In the case of *State ex rel Schieres v. Nimmons,*[134] the District Court of Appeal of Florida, First District, held that the acceptance of a plea of guilty is a discretionary act on the part of the trial judge and mandamus would not issue to force the trial judge to accept a validly offered plea of guilty.[135] The defendant was charged with second-degree murder and sought to enter a guilty plea to that charge because the prosecutor was going to go before the grand jury to seek an indictment against the defendant for first degree murder.[136] The trial court found that the attempt to plea was a tactical maneuver on the part of the defense, "designed to forestall the possibility of the Grand Jury's returning an indictment of

128. FLA. R. CRIM. P. 3.170(a) (West 1999).
129. *Id.* 3.170(k).
130. *See id.* 3.172(a).
131. *Id.* 3.170(i); *cf.* CAL. PENAL CODE § 1192 (West 1999).
132. *See* FLA. R. CRIM. P. 3.170; *cf.* CAL. PENAL CODE § 859a(a).
133. *See infra* notes 134 to 152 and accompanying text.
134. 364 So.2d 1262 (Fla. App. 1978).
135. *See id.*
136. *See id.* In Florida, first-degree murder constitutes a capital felony. *See* FLA. STAT. ANN. § 782.04 (West Supp. 2000).

murder in the first degree."[137] Rather than base its ruling on state law, the appellate court looked to the United States Supreme Court's decisions[138] in *Santobello v. New York*[139] and *Lynch v. Overholser*[140] to hold that "[t]here is, of course, no absolute right to have a guilty plea accepted . . . A court may reject a plea in exercise of sound judicial discretion."[141]

Seventeen years later, in *Rigabar v. Broome,*[142] the District Court of Appeal of Florida, Fourth District, explicitly held that "[w]hen the plea is knowing and voluntary, when there is a factual foundation to support it, when the state has agreed to it, then the discretion has ended and the plea must be accepted."[143] *Rigabar* involved a defendant charged with lewd assault[144] and attempt to commit a lewd act.[145] Rigabar wanted to avoid trial because the alleged victim in the case was his step-granddaughter.[146] Rigabar thought it would be in his "best interest" to plead guilty to the charges and not have his step granddaughter testify against him in open court. While he wanted to plead guilty, Rigabar did not want to admit that he was guilty of actually committing the crimes charged.[147]

When the trial judge refused to accept the plea because he did not believe in best interest pleas, the appellate court ordered him to

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137. *Schieres,* 364 So.2d at 1263.

138. The United States Supreme Court has repeatedly held that there is no *constitutional* right to plead guilty. *See* Santobello v. New York, 404 U.S. 257 (1971) (holding that under federal law there is no absolute right to have a guilty plea accepted and a court may reject a plea in exercise of sound judicial discretion); Lynch v. Overholser, 369 U.S. 705 (1962) (same). Accordingly, any right of defendants to plead guilty must be granted by state law. *See* North Carolina v. Alford, 400 U.S. 25 (1970). "[T]he States may by statute or otherwise confer [the right to plead guilty]. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence." *Id.* at 38 n. 11; *see, e.g.,* CAL. PENAL CODE § 859a(a) (West 1999); FLA. R. CRIM. P. 3.172 (West 1999); MASS. R. CRIM. P. 12(a)(1) (West 1995); N.Y. CRIM. PRO. § 220.10(2) (Lawyers Co-op. 1996).

139. 404 U.S. 257 (1971) (affirming the notion that under federal law there is no absolute right to have a guilty plea accepted and a court may reject a plea in exercise of sound judicial discretion).

140. 369 U.S. 705, 719 (1962). (holding that under federal law there is no absolute right to have a guilty plea accepted and a court may reject a plea in exercise of sound judicial discretion)

141. *See Schieres,* 364 So.2d at 1263 (quoting *Santobella,* 404 U.S. at 262).

142. 658 So.2d 1038 (Fla. App. 1995).

143. *Id.* at 1041.

144. *See* FLA. STAT. ANN. § 800.04(1) (West Supp. 2000).

145. *See id.* §§ 777.04(1), 800.04(2).

146. *See Rigabar,* 658 So.2d at 1040.

147. *See id.*

comply with the legislative mandate of Section 3.172 (d) and accept the plea.[148] The appellate court reasoned that "a judge cannot refuse a concession to a judgment of guilt merely because the trial judge does not like " 'best interest' " pleas.[149]

The *Rigabar* court distinguished the case from *Schieres* on the fact that the prosecution agreed to the plea in one (*Rigabar*) but not in the other (*Schieres*).[150] But, as noted by the *Rigabar* court on rehearing, the concession by the state of agreeing to the plea, "amounts to no concession at all, if the defendant has the right under rule 3.172 to plead without admitting guilt."[151] Thus, the *Rigabar* court affirmed the mandate of Florida's statutory scheme while trying to avoid expressed disagreement with *Schieres.* However, if the agreement of the prosecution is the only distinguishing factor between the two cases, then either *Rigabar* implicitly adds prosecutorial consent to the requirements of Rule 3.172, or *Schieres* was wrongly decided. One possible way to reconcile the two cases is to also view the trial judge in *Schieres* as applying some type of exception for dubious defense tactics in his discretionary rejection of the plea.[152]

In any event, in Florida, we have at least one case *(Schieres)* that seems to contradict the statutory scheme governing the acceptance of guilty pleas. Perhaps this is because the statute itself is not clear in its mandate. As such, the Florida Rules of Criminal Procedure are not particularly helpful in resolving the pending question.

More instructive than either the Massachusetts or Florida law is New York's Criminal Procedure Section 220.10. Section 220.10(2) provides that "[e]xcept as provided in subdivision (5), the defendant may *as a matter of right* enter a plea of "guilty" to the entire indictment."[153] The exceptions set forth in subdivision five include cases where, like Kurt Michaels's, the defendant is charged with murder in the first degree.[154] New York's definition of first degree murder is similar to California's murder with special

148. *See id.* at 1041.

149. *See id.*

150. *See id.* at 1041, n.6 ("We distinguish this case from *State ex rel. Schieres v. Nimmons* [citation omitted] where the plea was not agreeable to the prosecutor, who opposed it.").

151. *See Rigabar,* 658 So.2d at 1042 (clarifying that defendants do not have the right to plead guilty when that plea is conditional in any way).

152. *See* State ex rel. Schieres v. Nimmons, 364 So.2d 1262, 1263 (Fla. App. 1978); *cf.* Cronk v. Municipal Court, 138 Cal. App. 3d 351 (Cal. Ct. App. 1982).

153. N.Y. CRIM. PRO. § 220.10(2) (Lawyers Co-op. 1996) (emphasis added).

154. *See id.* § 220.10(5).

circumstances allegations.[155] As such, the New York law does nothing to temper filing decisions. Either the prosecutor must allege murder in the first degree (capital murder) or risk a best interest plea by the defendant. Thus, in New York, as in California, the decision to allege special circumstances amounts to nothing more than the ubiquitous "race to the courthouse." However, the New York statute is clear on its face: unless the case falls within one of the specifically enumerated exceptions, the defendant may plead guilty as a matter of right.[156]

From a review of the statutory and case authority of the jurisdictions that we have examined, it appears reasonably clear that there is a right to plead guilty to the existing charge. However, also as evidenced by these jurisdictions, that right has important limitations: the plea must be voluntary and knowing;[157] there must be a factual basis for the plea;[158] and the plea must be unconditional to the then-pending charge.[159]

IV. California Law as Applied to Michaels

While the state of the law in California may not be ideal for implementing the competing dynamics of allowing a defendant to plead guilty to the charges pending while at the same time allowing the prosecutor to make tempered filing decisions, Penal Code Section 859a(a) is clear in its mandate; unless a case falls within one of the specific judicially mandated exceptions,[160] the defendant may plead guilty as a matter of law to the then-pending charges. As such, California falls in line with the other jurisdictions considered.

Both statutory and case law in California are clear.[161] A defendant may plead guilty to all charges and when he does, all that remains is the pronouncement of judgment and sentencing. There is no requirement that the prosecutor consent to a guilty plea.[162]

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155. *Compare* N.Y. PENAL § 125.27 (Lexis 1998); *with* CAL. PENAL CODE § 190.2 (West 1999).

156. *See* N.Y. CRIM. P. § 220.10.

157. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969); Rigabar v. Broome, 658 So.2d 1038, 1041 (Fla. App. 1995); Commonwealth v. Del Verde, 496 N.E.2d 1357, 1360-61 (Mass. 1986).

158. *See* People v. Reza, 152 Cal. App. 3d 647, 654 (Cal. Ct. App. 1984); Commonwealth v. Dilone, 431 N.E.2d 576, 579-80 (Mass. 1981); MASS. R. CRIM. P. 12(c)(5)(A) (West 1995); FLA. R. CRIM. P. 3.172(a)(West Supp. 2000).

159. *See* Commonwealth v. Kelleher, 547 N.E.2d 56, 57 & n.2 (Mass. App. Ct. 1989); *Reza*, 152 Cal. App.3d at 654.

160. *See supra* notes 40-101 and accompanying text.

161. *See id.*

162. *See* CAL. PENAL CODE § 1016, subdiv. 1 (West 1999); People v. Superior Court (Smith), 82 Cal. App. 3d 909 (Cal. Ct. App. 1978).

Section 859a(a), as amended in 1970, does not require prosecutorial concurrence or judicial acceptance of guilty pleas.[163]

Penal Code Section 859a(a) sets forth the procedure by which a defendant may enter a guilty plea. When the statutory procedure set forth in Section 859a(a) is followed, the guilty plea must be accepted.[164] Once a guilty plea is entered, the prosecution may not amend the complaint to include new charges based on the same facts.[165]

Under California Penal Code Section 859a(a), a guilty plea to a lesser-included offense may be rejected by either the judge or the prosecutor. However, Michaels's guilty plea was not to a lesser-included offense. Michaels pled guilty to the murder count pending against him. He admitted all of the murder-related allegations with which he was charged. It is without merit to characterize the murder charge then pending against Michaels as a lesser-included offense.[166] At the time he elected to plead guilty to the murder count, Michaels faced no greater charge.

The California Supreme Court has made it clear that "[a] person cannot be convicted of an offense . . . not charged against him . . . whether or not there was evidence at his trial to show that he committed that offense."[167] Thus, without regard to the prosecution's stated intent to later amend the complaint to allege special circumstances, under California law, Michaels had an absolute right to plead guilty to the only murder charge pending against him at that time.

Judge Burley based his characterization of Michaels's plea as to a lesser-included offense on an erroneous interpretation of the law. Judge Burley stated that "[b]y the nature of the laws of

163. Section 859a(a) used to have a consent requirement for the acceptance of guilty pleas. However, that requirement was removed by legislative amendment in 1970. The 1970 amendments were initiated by then-Assemblyman Ken MacDonald at the request of Woodruff J. Deem who at the time was the District Attorney of Ventura County. Mr. Deem was concerned because the then-current version of Section 859a(a) at that time did not contain a provision for the taking of a plea of nolo contendere. As such, many magistrates refused to accept nolo contendere pleas because they did not think that they had the duty to do so. When the provision for the acceptance of a plea of nolo contendere with the prosecutor's consent was added to Section 859a(a), the requirement for consent to a guilty plea was removed. There is nothing in the legislative history of Section 859a(a), as amended, to indicate the rationale for this change.

164. *See Reza*, 152 Cal. App. 3d at 653.

165. *See* CAL. PENAL CODE § 1009 (West Supp. 2000).

166. In *Michaels*, the judge, district attorney, and attorney general all characterized Michaels's plea as one to a lesser-included offense.

167. *See In re* Hess, 288 P.2d 5 (Cal. 1955).

pleading . . . if I permit a plea to the court as it is stated, it is second degree. . . . [I]f you don't know when you take a plea, by law it becomes the lesser offense."[168]

The Judge was wrong. The court had the discretion and indeed the *duty* to determine the degree of murder itself before passing sentence,[169] but it did not have the discretion to refuse the plea.[170] Section 1192 of the Penal Code provides that "upon a plea of guilty . . . of a crime or attempted crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree."[171]

It is only where the court fails to set the degree that the plea is deemed to be to the lesser degree crime.[172] Michaels's plea was to the face of the complaint and would have subjected him to a sentence of first *or* second degree murder; the choice was the court's to make.[173] The plea was *not* to a lesser-included offense and Judge Burley's application of the discretionary portion of Penal Code Section 859a(a) was erroneous.

Kurt Michaels's plea falls more accurately within that part of Section 859a(a) dealing with pleas "to the offense charged."[174] Pursuant to the plain language of that section, a magistrate must accept a defendant's guilty plea to a charged offense, provided that the defendant has counsel present at the time of pleading.[175] Here, Michaels had counsel present and pled guilty to a pending charged offense.[176] Judge Burley had no discretion to reject Kurt Michaels's plea.[177]

V. Prosecutorial Discretion

It is curious, given the mandatory language of Penal Code Section 859a(a), that any district attorney contemplating capital charges would risk an early plea to a non-capital murder charge.

168. Transcript *supra* note 2, at 32-33.
169. *See* CAL. PENAL CODE § 1192 (West 1999).
170. *See* CAL. PENAL CODE § 859a(a).
171. CAL. PENAL CODE § 1192.
172. *See id.*
173. *See* id.; *see, e.g., In re* James, 38 Cal. 2d 302, 304-12 (Cal. 1952); People v. Mendez, 27 Cal. 2d 20 (Cal. 1945).
174. *See* CAL. PENAL CODE § 859a(a) (West 1999).
175. *See id.*; *see also People v. Reza*, 152 Cal. App.3d 647, 654 (Cal. Ct. App. 1984) (holding that it is error not to accept a competent defendant's unconditional plea of guilty in a non-capital case where there is a factual basis for the plea).
176. *See* Transcript *supra* note 2, at 4.
177. *See Reza*, 152 Cal. App. 3d at 654; People v. Bas, 194 Cal. App. 3d 878, 880-81 (Cal. Ct. App. 1987).

Yet the practice was in place in 1988 when Kurt Michaels attempted to plea, and the practice is in place today.[178] The safe route would have prosecutors initially filing capital charges given any possibility that capital charges might ultimately be charged. However, such a practice may well run counter to the exercise of sound prosecutorial discretion.

Section 859a(a) allows a defendant to plead guilty to the pending charge against him and for all imaginable scenarios save those cases where capital charges are still being considered. Section 859a(a) is sound law. However, in the potential capital case, where the need for full and careful prosecutorial deliberation should be at its utmost, Section 859a(a) virtually binds the hands of the prosecutor. The very essence of prosecutorial discretion is to permit that degree of flexibility necessary "to do the right thing." The "one rule fits all" mode of Section 859a(a) renders a disservice to the notion of careful and thoughtful deliberation in making capital filing decisions.

Apart from any specific statute or any particular appellate court decision, the search for a solution to the problem raised in the *Michaels* case may lie in the doctrine of prosecutorial discretion. We cannot fix what has already occurred.[179] However, we can look to the future and suggest a methodology that will allow for maximum prosecutorial discretion while still adhering to the common sense notion, and indeed the statutory and case authority, that one accused of a crime may plead guilty to that crime. However, prior to setting forth any suggested revisions to California's Penal Code, we should examine the genesis, scope, and importance of prosecutorial discretion. This discretion is the key element which allows our criminal justice system to adapt to the various factual situations with which it is faced.[180]

"The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law. The judicial deference shown to prosecutors generally is most noticeable with respect to the charging function."[181] This function is one of the most important exercised by prosecutors. "No government official

178. A cursory survey of various California counties has shown that several District Attorneys' offices are still following the filing practices utilized by the San Diego District Attorney in the *Michaels* case.

179. The California Supreme Court will, of course, use the law as it existed in 1988 in deciding the fate of Kurt Michaels.

180. *See* Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

181. Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513 (1993)

can effect a greater influence over a citizen than the prosecutor who charges that citizen with a crime."[182]

The source of prosecuting officials' discretionary power varies from jurisdiction to jurisdiction. The authority of prosecutors is detailed in state constitutions of thirty-three states[183] including Florida,[184] New York,[185] and Texas.[186] In Illinois[187] and eleven other states, authority for local prosecutors is statutorily provided.[188] In California, the criminal charging function of prosecutors is derived from both a constitutional article and a statute. Article VI, Section 20 of the California Constitution provides, "[t]he style of all process shall be 'The People of the State of California' and all prosecutions shall be conducted in their name and by their authority."[189] "Government Code Section 26500 states that the district attorney is the public prosecutor. He shall attend the courts, and conduct on behalf of the People all prosecution for public offenses."[190] As one court noted, "[t]his tandem of a constitutional and statutory authority has found application in a number of cases which under varying circumstances appear to recognize, albeit obliquely, the requirement that criminal prosecutions require the district attorney's approval for their institution."[191]

The discretion of prosecutors to charge criminals has been interpreted very broadly. In the federal criminal justice system as in most state schemes, the government retains "broad discretion" as to whom to prosecute.[192] "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[193] Thus, while the sources of their authority vary, prosecutors have very broad discretion in determining if and what charges to file.

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182. Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 671 (1992).
183. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 732 (1996).
184. See FLA. CONST. art. V, § 17.
185. *See* N.Y. CONST. art. XIII, § 13(a).
186. *See* TEX. CONST. art. 16, § 65.
187. *See* ILL. CONST. art. 6, § 19.
188. *See* Misner, *supra* note 183, at 732.
189. CAL. CONST. art. VI, § 20.
190. CAL. GOV. CODE § 26500 (West 1988).
191. People v. Ventura County, 27 Cal. App. 3d 193, 201 (1972).
192. United States v. Goodwin, 457 U.S. 368, 380 (1982).
193. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

However, this vast discretionary power of prosecutors is not without its detractors, some of whom claim that judicial review or legislative constraints ought to be implemented.[194] In support of such limitation, Douglas Noll states several rationales for controlling prosecutors' discretion. He claims that "[b]y giving the prosecutor virtually uncontrolled screening discretion, the possibility that like persons in like circumstances will be treated differently is increased.... Thus, individual defendants may suffer from inconsistency in screening decisions."[195] The power to invoke charges and to determine which charges to file translates into a power to determine if and how citizens will be punished. "Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community – racial and ethnic minorities, social outcasts, the poor – will be treated most harshly."[196]

Courts have considered the implementation of constraints on prosecutorial discretion. The Supreme Court in *United States v. Batchelder* upheld the prosecutor's discretion in a case involving a defendant who was convicted and sentenced under one of two statutes that forbade the possession of a firearm.[197] The defendant claimed that because he was charged under the statute which authorized the greater punishment, his constitutional rights were violated.[198] The Court upheld the prosecutor's decision stating, "whether to prosecute and what charges to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."[199]

In *Wayte v. United States,*[200] the Supreme Court held that the decision of whether or not to prosecute is ill-suited to judicial review because prosecutors have to take into consideration many factors – the strength of a case, the deterrence value of a prosecution, and the case's relationship to the government's enforcement priorities – which a court could not competently

194. *See* Douglas Noll, *Controlling a Prosecutor's Discretion Through Fuller Enforcement*, 29 SYRACUSE L. REV. 697, 698 (1978).
195. *Id.*
196. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981).
197. 442 U.S. 114, 124 (1979).
198. *See id.* at
199. *Id.* at 123-24.
200. 470 U.S. 598 (1985).

undertake.[201] The above cases reflect that few courts are willing to limit prosecutorial discretion absent a showing of abuse.[202]

The policies in favor of maintaining broad discretionary power have been outlined by scholars, practitioners, and the courts. Limited resources, systematic costs, separation of powers, and the desire for individualized justice are important policy considerations which support maintaining broad discretion in prosecuting officials.[203]

One of the strongest arguments in favor of broad prosecutorial charging discretion is the idea of individualized justice. "Significantly curtailing prosecutorial discretion would accomplish consistency at the cost of individualized justice."[204] "This type of discretion [case specific assessment] is not only inevitable but also desirable."[205] Eliminating or curtailing case specific evaluations by prosecutors does not limit discretion but places it solely in the hands of police.[206] Predetermined rules, which do not allow for prosecutorial decisions, decrease the flexibility and sensitivity often desirable in criminal proceedings.[207] "It [prosecutorial discretion] permits a prosecutor in dealing with individual cases to consider special facts and circumstances not taken into account by the applicable rules."[208] For example, a Massachusetts gun-control law imposed mandatory one-year jail terms for possession of an unlicensed handgun.[209] One of the first persons to be prosecuted under that statute was an elderly woman passing out religious leaflets from a bag that contained her lunch and a gun she felt that she needed for protection.[210] Because prosecutorial discretion had been limited, the court had to find another pretext for dismissing the case.[211] This type of judicial action undermines the criminal justice system. Many cases require flexibility in charging in order to avoid absurd and damaging results.

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201. *See id.* at 607.

202. *See* ABRAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEAS 52-75 (1981).

203. *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. Rev. 105, 159 (1994).

204. Melilli, *supra* note 182, at 674.

205. *Id.* at 675.

206. *See id.*

207. *See* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971).

208. *Id.*

209. *See* Vorenberg, *supra* note 196, at 1551 (quoting BOSTON GLOBE, Aug. 3, 1975, at 3, col. 4).

210. *See id.*

211. *See id.*

Moreover,

> [o]ne sense of justice demands that similarly situated people be treated alike; another demands that each man be treated according to his desserts. The first sense of justice demands that definitions of crimes be stated generally and be applied to all similarly situated persons; the second demands that these general rules be flexible enough to allow for variations in individual circumstance. Eventually someone must give meaning to the words of the law, and that interpretation process inevitably involves substantial discretionary elements.[212]

In addition to case specific considerations, the law itself may be flawed and require discretionary decisions in order to avoid unduly harsh enforcement. "Discretion protects citizens from the excessive breadth or antiquated nature of the substantive criminal law. Not all laws currently on the books are realistically intended to be enforced."[213] Discretion is necessary because it is difficult for the legislature to tailor laws precisely to the various facts that may be relevant in a pending case;[214] decisions must be made by administrators of criminal law about the method and direction of the prosecution.[215] Discretion is also necessary because it is difficult to adapt statutory law quickly to changes in public attitudes.[216]

Every jurisdiction grants broad discretion to prosecuting officials. Limited resources, the doctrine of separation of powers, and the desire to maintain a flexible justice system have convinced courts and legislators that prosecuting officials must retain broad discretion in the charging function. Never is the proper use of that discretion more true than when contemplating capital charges.

Prosecutorial discretion is requisite in factoring in the myriad considerations in bringing capital charges and the prosecutor should be allowed maximum input prior to that decision. In the proper use of their discretion, prosecutors should be permitted to push back the charging decision as far as possible in these cases to gain optimum knowledge and perspective. And that is presumably what the San Diego District Attorney was attempting in the case of Kurt Michaels. However, Michaels's plea preempted that careful obligation. The District Attorney should have been permitted

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212. Arthur Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12, 20 (1972).

213. Wayne A. Logan, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695, 1721 (1990).

214. *See* Abrams, *supra* note 207, at 3.

215. *See* People v. Golz, 368 N.E.2d 1069, 1073 (Ill. 1977).

216. *See* Abrams, *supra* note 207, at 3.

additional time yet was precluded by the structure of California law.

VI. Proposed Modification to Existing California Law

Section 859a(a) of the California Penal does not permit that degree of discretion and flexibility necessary in murder cases with capital potential. The rigid nature of Section 859a(a) may force prosecutors into early filing decisions that ultimately may not be appropriate to the circumstances. It is in society's best interest to have a California law that allows greater flexibility in making capital-filing decisions. Section 859a(a), as currently written, precludes that necessary flexibility. With but modest modification of Section 859a the early plea concern should be eradicated. We propose that the Amendment to Section 859a be as follows:

Section 859a (changes in bold)

(a) If the public offense charged is a felony not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him or her whether he or she pleads guilty or not guilty to the offense charged therein and to a previous conviction or convictions of crime if charged. While the charge remains pending before the magistrate and when the defendant's counsel is present, **except as provided in subdivision (c) of this section,** the defendant may **as a matter of right** plead guilty to the offense charged; *if the* **offense is one which may be distinguished or divided into degrees, the magistrate shall determine the degree of the crime to which the defendant is pleading.**[217] **The defendant may,** with the consent of the magistrate and the district attorney or other counsel for the people, plead nolo contendere to the offense charged or plead guilty or nolo contendere to any other offense the commission of which is necessarily included in that with which he or she is charged, or to an attempt to commit the offense charged and to the previous conviction or convictions of crime if charged upon a plea of guilty or nolo contendere. The magistrate may then fix a reasonable bail ....

(b) ....

(c) In a homicide case when the district attorney or other counsel for the people files notice with the court and the defendant that the district attorney or other counsel for the people has a good-faith belief that special circumstances allegations may later be

217. *See* CAL. PENAL CODE § 1192 (West 1999).

added to the charging document so as to make the defendant eligible for the death penalty as provided in Section 190.2 of this code, then the defendant may not plead guilty to the charged offense unless the magistrate and the district attorney or other counsel for the people consent to such a plea.

VII Conclusion

The San Diego District Attorney was put in an untenable position in the *Michaels* case. It properly used its prosecutorial discretion to delay and assess developments prior to the ultimate filing decision. However, in carefully exercising restraint and seeking maximum input prior to making the filing decision, the district attorney ran the risk of an early plea to non-capital charges.

The district attorney should not have been put in that position. It is our sense that the legislature was not cognizant of the problem that occurred in *Michaels*. The proposed modification of Section 859a allows time for careful and thoughtful scrutiny and properly restricts the right of the accused to plead guilty under the limited circumstances presented.

By requiring the prosecutor to file notice with the court and the defendant that death-qualifying charges may be sought, the legislature can ensure that prosecutors are not forced to file death penalty charges at early stages of proceedings when, in fact, such charges may not be warranted. Of course, this process will erode some of the rights that defendants currently have under Section 859a. However, those rights have already been *de facto* abolished by prosecutors who overfile capital charges in order to avoid best interest pleas and by judges who do not follow the mandate of the existing statutory scheme.